

WCA Rule Advisory Committee
3/27/08 Meeting
Supplemental Information - Replacement

The following information is a supplement to the draft Replacement section regarding wetland typing and in-kind replacement. This information was provided to the Technical Committee and served as a basis for discussion. It was intended to provide some background of BWSR staff rule team discussions and provide some options for the Technical Committee to consider, particularly where there were major differences of opinion among rule team members.

Wetland Typing

The current rule uses both Circular 39 and Plant Community Types. BWSR staff have proceeded under the assumption that the updated rule would likely convert to Plant Community Types if possible. However, several comments have been submitted concerning the Plant Community Typing system (both positive and negative) and Technical Committee members requested the issue be revisited and options explored.

The BWSR staff rule team discussed the issue at length and considered several different options. In general, rule team members agreed that the Plant Community Typing system is a better system scientifically. However, many members felt that the application of that system to policy (particularly the current in-kind requirements of WCA) created problems and administrative difficulties. Of the options discussed, the following are the two currently recommended for consideration:

- 1) Consolidate the Plant Community Types to correspond to the eight Circular 39 types for application to policy (same for exemptions and replacement). Under this option, the LGU could still have the ability to require further splitting of types and/or a different replacement ratio.
- 2) Use Plant Community Types (as modified by the BWSR/Corps MOU).

Under either option, the In-Kind replacement requirement could be modified so applicants who failed to replace type-for-type would not be penalized as long as they made a “good faith effort” to do so.

Other options considered were:

- 3) Utilize Circular 39 exclusively but provide a cross-reference table.
- 4) Utilize Plant Community Types but combine sedge meadow and fresh wet meadow.
- 5) Utilize Plant Community Types but differentiate between hardwood and coniferous swamp.
- 6) Any of the above with modifications to In-Kind requirements (these will be considered separately).

In-Kind Replacement

It was difficult to discuss wetland typing (above) without also discussing the current In-Kind replacement requirements of the exempt rule. BWSR staff Rule Team members discussed the purpose and intent of the requirement, as well as different alternatives to the current rule. There was general agreement that at least some modifications to the In-Kind requirement should be made. There was not agreement on the extent of those modifications or which alternative was preferred. Of the alternatives discussed, two are currently under consideration. BWSR staff with differing opinions “made their case” and developed the alternatives below. They are not complete and there is not full agreement between staff of the statements contained in each alternative, but they were intended to provide the Technical Committee with some details about the rule team’s discussions and each side’s positions.

Alternative #1: Keep in-kind incentive tied to replacement ratio, but add rule language that allows the LGU to consider other types of replacement as in-kind.

Background: Wetland regulation existed long before the Minnesota Wetland Conservation Act (WCA) was established and many of the WCA concepts related to avoidance, minimization, and replacement of wetland impacts tie back to these older regulatory programs, most notably the Section 404 Regulatory program. One such concept that was incorporated into WCA is the preference for in-kind replacement. A February 1990 MOA between the EPA and Corps of Engineers stated that the “functional values” lost due to an impact must be considered when evaluating compensatory mitigation, and in-kind replacement is preferable to out-of-kind replacement.

The basic rationale behind this preference for in-kind replacement is that a wetland of the same “kind” or type is more likely to replace the functions and values lost due to an impact than a wetland of a different type. This is not a question of which wetland type is better, but rather it is a question of are the specific functions and values lost adequately replaced. A good quality deep marsh replacement site cannot replace the same functions and values lost by an impact to a good quality inland fresh meadow. Both wetland types are valuable and relatively high functioning; however, they do not provide equivalent function. In the absence of reliable information documenting the replacement of specific functions and values lost due to an impact, a 0.25:1 increase in the required replacement ratio for out-of-kind replacement is a reasonable requirement.

The May 2007 BWSR U.S. Army Corps of Engineers Memorandum of Understanding laid out a framework for recognizing three fundamental components that are important to consider in wetland replacement decisions. These fundamental components are 1) wetland type or plant community (“in-kind”), 2) location of wetland replacement, and 3) timing of wetland replacement. Alternative #1 recognizes that the type of wetland plant community or the “In-kind” concept is an important factor and builds an incentive into the regulatory framework that encourages the restoration of all wetland plant communities in the state.

- This alternative builds in a 0.25 ratio incentive for project applicants to replace the same wetland plant community as the one that is impacted.
- This alternative also builds in an option for the LGU to consider other different plant community types as in-kind replacement as long as similar functions and values are replaced. This approach would require BWSR to develop guidance to help LGUs to determine proper application of this flexibility.

Pros:

- Builds an incentive into the regulatory framework that encourages development of wetland mitigation sites that reflect the many wetland plant communities in Minnesota.
- This option recognizes that replacement of certain wetland plant communities (forested wetlands) is difficult and provides for predictability (increased ratio) for northeastern and north central Minnesota.
- Provides some consistency with the Corps and the MOU.
- Utilizes current scientific knowledge on replacement of functions and values while allowing for flexibility when circumstances dictate it.

Cons:

- Replacement ratio calculation will require use of a table.
- Not entirely consistent with Corps policy and MOU.
- The second arrow/bullet above increases subjectivity in determining what constitutes appropriate replacement.

Alternative #2: Eliminate the in-kind requirement tie to replacement ratios and replace it with a replacement standard that would make in-kind the first priority, but provide criteria where out-of-kind would be allowed.

Background: The overarching requirement of replacement is that the replacement wetland must replace the public value of the impacted wetland. The in-kind replacement requirement (impacted and replaced wetland must be the same type) is based on the assumption that replacing type for type results in better replacement of wetland functions that were lost to the impact, and thus better replaces the lost public value. However, this also assumes that currently existing wetlands are the most valuable. Yet we know that many wetlands have been degraded and/or are of a different type than what existed pre-settlement, and we know that the public may place more or less value on different types of wetlands based on the functions they provide. Thus replacement of a different type may (and often does) do a better job of replacing lost public value. The tie between type-for-type replacement and replacement ratios may also pose an incentive for creations over restorations (in an attempt to lower their replacement ratio rather than restore wetland of a different type or buy bank credits). The tie to replacement ratios can also make it confusing to landowners and difficult for LGUs to administer and enforce.

The BWSR-Corps MOU includes the in-kind replacement concept with the understanding that both agencies will seek to incorporate it into their respective regulatory programs. This alternative would incorporate this concept into the WCA rule through the wetland replacement standards criteria rather than through replacement ratios. The alternative would include the following components:

- The required replacement ratio would not be affected by the in-kind requirement. Rather, in the replacement wetland standards of the rule, in-kind replacement would be designated as a requirement of replacement, with flexibility allowed for out-of-kind replacement under certain circumstances.
- Criteria would be established to provide guidance for the LGU and/or TEP to consider in determining whether out-of-kind replacement is appropriate. A requirement for TEP consultation or concurrence could be included. The following are some possible examples of those criteria:
 - The uniqueness/rareness of the wetland or plant community impacted.
 - The impacted wetland was degraded and/or is a different type than what naturally occurred.
 - An opportunity exists for the applicant to restore a naturally occurring wetland of a different type.
 - The abundance/prevalence of the impacted plant community type in the area.
 - The ability to replace the lost wetland functions with a different plant community type, i.e. wet meadow with sedge meadow (out-of-kind replacement would adequately replace lost functions and values).
 - The ecological site suitability of the proposed replacement (opportunities may not exist for the applicant to create/restore a wetland of the same type that would naturally occur in the landscape).
 - The functional needs of the affected watershed and value to the region.

Pros:

- Gives flexibility to the LGU and TEP to make appropriate function and value decisions within a science-based decision framework.
- Is consistent with the spirit and intent of the MOU.
- Utilizes current scientific knowledge and the use of adopted wetland plant community type system.
- Simplifies replacement ratio calculations.
- Provides a strong incentive to do in-kind replacement when appropriate, recognizes other opportunities for quality replacement, and achieves the overall purpose of replacement.

Cons:

- Not consistent with Corps methods of determining replacement ratio.
- Increases subjectivity in determining what constitutes appropriate replacement.
- Because the in-kind requirement is not tied to replacement ratio, the incentive to replace in-kind could be viewed as weak.

Other options considered for the in-kind replacement issue included:

- A) Eliminate it entirely.
- B) Eliminate it entirely but increase replacement ratios across the board.
- C) Keep it as is in the Exempt Rule.

Technical Committee Recommendation

The Technical Committee reviewed the above information and discussed the issues in-depth. For wetland typing, the Technical Committee recommended consolidating the plant community types into groups that correspond to the 8 Circular 39 types (Option #1) for the application of policy (being consistent for replacement and exemptions).

For the in-kind replacement requirement, the Technical Committee recommended that the current in-kind requirement's tie to replacement ratios be replaced with a standard for in-kind as the first priority (Alternative #2). The Committee recommended the specific criteria be further developed for use in the WCA Rule.

At least one Technical Committee member also recommended Option B above remain in consideration.